

1. 1412935 (Migration) [2015] AATA 3950 (21 December 2015)
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DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANTS: Mr Sunil Jashvantbhai Thakkar
Mrs Ripal Sunil Thakkar

CASE NUMBER: 1412935

DIBP REFERENCE(S): BCC2013/1717597

MEMBER: Don Smyth

DATE: 21 December 2015

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the following directions:

- the first named applicant meets Public Interest Criterion 4020 for the purposes of cl.187.213(1) of Schedule 2 to the Regulations;
- the first named applicant meets Public Interest Criterion 4020 in respect of the second named applicant for the purposes of cl.187.213(3) of Schedule 2 to the Regulations; and
- the second named applicant meets Public Interest Criterion 4020 for the purposes of cl.187.313(1) of Schedule 2 to the Regulations.

Statement made on 21 December 2015 at 12:29pm

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 8 July 2014 to refuse to grant the applicants' Regional Employer Nomination (Permanent) visas under s.65 of the *Migration Act 1958* (the Act).
5. The applicants applied for the visas on 24 October 2013. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl.cl.187.213(3) of Schedule 2 to the Migration Regulations 1994 (the Regulations) because he had provided a bogus document. The delegate found that PIC 4020 was a "one fails, all fail" provision. The delegate found that the second named applicant did not meet cl.187.313(1).
6. The applicants appeared before the Tribunal on 12 October 2015 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Jashvantbhai Thakkar.
7. The applicants were represented in relation to the review by their registered migration agent.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted.

CONSIDERATION OF CLAIMS AND EVIDENCE

9. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl.cl.187.213(3) for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: cl.4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy cl.4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: cl.4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: cl.4020(2B) and (2BA).
10. The requirements in cl.4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: cl.4020(4). However, this waiver does not apply to the identity requirements in cl.4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.
- 11.

12. Background

13. The applicant indicated in his visa application that the application was related to the position of Café or Restaurant Manager. The applicant indicated in the visa application that the nomination type was Direct Entry.
14. In his application, the applicant set out details of his educational and employment history. This included information regarding his employment with Sai Baba Agency from 1 April 2003 to 31 October 2008. The duties were described as follows: "Incharge and Manager managing the agency operations. Detailed list of duties in resume." The applicant also submitted a "Personal particulars for assessment including character assessment" (Form 80). In this form he listed his past employment. He referred to employment with Saibaba Agency from April 2003 to October 2008. He described the position and duties as follows: "Manager for a firm in the business of Flour Mill. As in Resume".
15. The applicant submitted a range of documents in support of the application. These included a Curriculum Vitae. In his curriculum vitae, he stated under the heading "Detailed Experience History", "More than 7 years experience in management roles, both as a manager and assistant manager in various industries sectors where I was able to apply my skills and have become more knowledgeable in finding ways, methods and techniques to solve problems." He listed his work experience, including experience as "Incharge and Manager" at Sai Baba Agency in Gujarat from 1 April 2003 to 31 October 2008. A number of duties were listed. The Curriculum Vitae listed Mr Jashvanthbhai A. Thakkar as a reference.
16. The applicant provided a number of references, including a reference from Jaswant A. Thakkar, proprietor of the Saibaba Agency company. There is also an untranslated version of this document. This letter stated that the applicant had served in the business "as a Supervisor" from April 2003 to October 200. It provided details of his remuneration and indicated that five staff had been under his charge. The letter provided a list of some of the responsibilities of the position, as follows:
 - To get production as per requirement of client and to deliver the same on time.
 - To solve the problems of clients.
 - To keep watch on daily production line.
 - To communicate with clients.
 - To provide staff selection and training.
 - To keep watch on delivery department.
 - To prepare time table of staff.
 - To keep record in respect of accounts.
17. The Department's records indicate that an officer of the Department conducted checks on 1 May 2014.
18. It is recorded that the officer called the number recorded on the work reference letter provided by the applicant. Mr Jashwant answered the telephone and forwarded the call to Mr Salim who indicated that he had been working at the business for twelve years. With regard to the information provided by Mr Salim, the following is recorded:

- I asked him about other workers and he stated that there are 4 other workers but now only 3 workers are left. Mr. Ajay has stopped coming. Now Mr. Salim, Mr. Nirmal and Mr. Ranchod Bhai are working.
- I asked him about Sunil Thakkar and he stated that PA is the son of the owner of the business Mr. Jashwant. He stated that Mr. Sunil has come to office sometimes when he was in India. At the moment he is in Australia.
- He stated that Mr. Sunil and his brother Prashant used to come to the business sometimes for a short while.

19. It is recorded that Mr Jashwant then took the telephone from Mr Salim. It is recorded that, when told the officer was calling from the Australian High Commission, Mr Jashwant provided the following information:

- Mr. Jashwant is the owner of the business since 1984. The business makes grinding machines.
- He has 3-4 workers and he himself manages the business. Now Mr. Salim, Mr. Nirmal and Mr. Ranchod Bhai are working with him as workers who are into fitting, grinding, making the machine. These workers have been working with him since 10 years plus.
- I asked him if there is any supervisor - and he stated that he has only 3-4 employees and does not really require a supervisor.
- He stated that his son Piyush also comes to work with him at times.
- He said that he pays a salary of INR 8,000 to his son.
- Then he stated that earlier his son Sunil who is in Australia also came to work and was paid a salary of AINR 8,000.
- He stated that no attendance records are kept.
- He stated that no training is provided to the workers who have joined him. He stated that most of these workers are ITT trained and do not require any training. All his workers were self-trained and not provided with any on the job training.
- He stated that his son Sunil used to come to work and make the grinding machines. He used to work on the lathe machine.
- He stated that he himself does all the client handling and that his sons are still young to do client dealing and marketing.
- The salary is paid in cash on a weekly basis and record is kept with the accountant.
- All accounts is handled by Shankar Bhai since the business has opened.
- The time schedule for the workers is prepared by the owner. He stated that his sons do not prepare is as they are young and the workers would not listen to them.

- I asked him if he has provided any reference letter to his son he stated that he has not provided any reference letter.
 - When I told the referee that we have a letter signed by him, he stated that he might have signed a letter prepared by his son because he does not know English
20. By letter of 14 May 2014, the Department invited the applicant to comment on adverse information it had received. In response, the applicant provided an affidavit, dated 7 June 2014, from Mr Jaswant Thakkar. Mr Thakkar acknowledged that he had received a call from "Australian immigration New Delhi" in relation to the applicant's work experience. He stated that the applicant had in fact been working as a supervisor. He indicated that he had a conversation with the officer in Hindi as he did not know English. He set out what he claimed was his recollection of the conversation.
 21. Jaswant Thakkar stated that he had given a work reference letter in the local language, Gujarati, and in line with the Australian immigration requirement the applicant provided that in English with a certified translation. He stated that the details referred to in the natural justice letter from the Department were not true. He stated that they did not provide "any fraud letters to anyone".
 22. The applicant also provided a statutory declaration dated 7 June 2014 in which he stated that he had worked at Saibaba Agency from April 2003 to October 2008, and described his duties. He stated that he received a letter from Mr Jashvant Thakkar in the local language, Gujarati. As it was a requirement that all documents should be in English, he obtained a translation.
 23. The applicant also submitted a "Notification of incorrect answer(s)" (Form 1023) dated 7 June 2013. He indicated that the information that was incorrect was information in his employment history indicating that Sai Baba Agency was in Australia and related to the nomination position. He stated that the correct details were that Sai Baba Agency was in India and that this employment was not related to the nominated position.
 24. On 8 July 2014, the delegate made a decision to refuse to grant the visa. The delegate found that the applicant had provided a reference letter which was considered to be a "bogus document" and that he did not meet PIC4020(1)(a). The delegate found that the applicant did not meet cl.187.213(3) and that the applicant wife did not meet cl.187.313(1).
 25. The Tribunal was provided with numerous additional documents in support of the review application. These documents included documents related to Saibaba Agency such as an organisational chart, the wages register for the business, an Establishment Registration Certificate for an establishment in Surat, a number of tax invoices, income tax records and a letter signed by the proprietor of Pukhraj Mill Stone Agencies. The applicant also provided a further translation of the initial reference letter from Jashwant A. Thakkar. Unlike the initial translation that had been provided, this version was produced by a NAATI recognised translator. The Tribunal considers that it is in substance the same as the earlier English version of the letter, although there are some changes to the wording.
 26. The Tribunal was provided with a number of statements from Jasvanthbhai Thakkar. In a statement of 22 May 2015, he described the establishment of his business and the nature of his business. He described having a sales shop at Surat, approximately 150 kilometres from his factory, sales shop and home at Vadodara. He indicated that the Surat shop had become his full-time responsibility. He indicated that, after the applicant finished his grade 12, he had asked him to take a position of supervisor in the factory/sales shop. He referred to the applicant's duties. He stated that the content of his statement was spoken by him in Gujarati

and translated into English. In a further statement, Jashvant Thakkar disputed the content of the Department's record of the phone conversation between him and the Australian High Commission in May 2014. For instance, he stated that no person by the name of Salim had ever worked for them. At the time of the call he was at the shop in Surat and there was no call forwarding facility. He stated that they had three workers working for them and had never had a worker named Ajay working for them. He stated that his business had been established in 1987. He stated that, being an owner for so many years, he would never have mentioned 1984. He stated that, as far as he knew, there was no mention of pay throughout the phone call. He referred to other elements of the conversation, saying, for instance, that the workers had never been paid on a weekly basis. He stated that he had signed the letters in Gujarati and the English translation. He stated that he received help from the accountant in writing the letters as he could not type and did not know computers.

27. The applicant's representative provided a submission dated 12 October 2015. The representative referred to the interview between the New Delhi post and the applicant's former employer. It was submitted that there was no recording of the interview and the transcript was purely based on the officer's recollection. It was noted that the interview was conducted in Hindi while the reference had been written in Gujarati. It was submitted that there were inaccuracies from the case note of the interview. It was submitted, for instance, that the relevant premises did not offer call forwarding facilities, that wages records indicated that there were no employees named Mr Salim or Mr Ajay, that Mr Thakkar's brother was incorrectly named in the interview notes, that there were in fact attendance records, that the applicant's wages were not paid fortnightly and that the business had been established in 1987. With regard to the applicant's role as a supervisor, reference was made to records of the applicant's annual income, and to a reference letter and invoices from Pukhraj Mill Stone Agencies. It was submitted that the applicant was an appropriately skilled person to fill the nominated position. The applicant had been able to demonstrate his skills without providing the employment reference from Saibaba Agencies and had nothing to gain by being a party to a fraudulent reference.
28. The Tribunal was provided with additional documentation, including an employment reference and invoices issued by Pukhraj Mill Stone Agency, an employment reference from Saibaba Agencies, tax records for the applicant, balance sheets for Saibaba Agencies and copies of wage registers for the period from 2004 to 2006. Additional documentation, including material such as invoices and other business records, were produced by the applicant at the hearing.
29. The applicant attended a hearing on 12 October 2015. The applicant's evidence at the hearing is summarised below.
30. At the hearing, the applicant indicated that a nomination in relation to the relevant position of Café and Restaurant Manager had been approved. The applicant confirmed that Jaswant Thakkar was the same person as Jashvantbhai Thakkar. He indicated that this person was his father.
31. In summary, the applicant claimed firstly that the work reference was not relevant to the application. He referred to the Form 1023 that had been submitted. The applicant said they had asked him to provide all the information after he had finished twelfth grade. The agent said he had to provide information for the gap period as well. The applicant's representative stated in relation to the nominated position of Café or Restaurant Manager that the applicant had the relevant qualification and he had also worked in Australia. She said he would meet the relevant requirement without this evidence.
32. With regard to the reference letter, the applicant indicated that this had been made in Gujarati with the help of the accountant and that an English translation had been made and

sent to him at his request. He indicated that the English version was a locally translated copy, and his father had signed both copies. He indicated that his father had been aware of the content of both copies when he signed them. He said his father knew about the Gujarati version because he and the accountant did it together.

33. When referred to the record of the Department's inquiries, the applicant questioned the accuracy of the record. He referred to his father's record of the conversation. He claimed, for instance that they had said that his father transferred the phone to Salim Bhai but they never had an employee with such a name. The business was in Surat and his father was the only person staying there. They had never had a second person there. He said that the name of the brother was recorded incorrectly. The applicant referred to his father having two different shops in two different cities. He referred to the situation being different for the business after the communal riots. He said there was a different shop with an independent factory and sales shop. He needed someone at that shop at that time. He referred to matters such as the training requirements of the business. The applicant described the premises in Surat and Vadodara and referred to various documents in this regard. He referred to documents such as the employment wages register, bank receipts and tax invoices from different suppliers. He referred also to the reference and other documents from Pukhraj Mill Stone Agencies. He referred to income tax records showing that he received wages.
34. The applicant stated that his father knew from the start that he had provided the letter and was aware of this.
35. At the hearing, the Tribunal also spoke with Jaswant Thakkar. He indicated that he was aware of the reference and that he signed the reference. When asked whether he had prepared his son's work reference himself, he replied in the affirmative. When asked how he had prepared the reference, his initial evidence was that they had an accountant. He knew English. The accountant wrote the things in English and he signed it. Mr Thakkar confirmed that the letter he signed in September 2013 was in English. He confirmed that he signed a letter in Gujarati at that time, although he later said that the reference would have been in English. Mr Thakkar stated that his son had been working as a supervisor. Mr Thakkar disputed the record of his conversation with the Australian High Commission in May 2014.
36. The Tribunal gave the applicant and his representative time to make post-hearing submissions.
37. Following the hearing, the applicant's representative made further submissions in relation to whether there was any information that was false or misleading in a material particular. Reference was made to cl.187.234 of Schedule 2 and, in particular, subparagraph (c). It was submitted that the applicant had been nominated to fulfil the position of Café/Restaurant Manager (ANZSCO code 141111). ANZSCO provided that the relevant qualification was an Australian Associate Degree, Advanced Diploma or Diploma. If a visa applicant did not possess the relevant qualification, three years of relevant experience might be sufficient. It was noted that the applicant had provided a copy of his Australian qualifications at the time of application. These included, for instance, an Advanced Diploma of Management, a Diploma of Business and a Diploma of Management. These qualifications had been obtained while the applicant resided in Queensland. Further, the applicant had been employed in various positions related to food, café and restaurant management. It was submitted that the applicant appeared to have held the necessary experience and qualifications for the nominated position. It was submitted that irrelevant employment should be disregarded. It was submitted that the employment reference had not been intended by the applicant to be relevant for the purposes of the skills requirement in r.187.234. Reference was made to the submission of the Form 1023. It was submitted that the applicant did not understand why the Department would or could have believed that the employment reference was false as there

was no significant importance placed on it. He had merely been attempting to demonstrate his professional background.

38. With respect to the applicant's father, it was submitted that he was 57 years old and had completed only seven years' schooling. It was submitted that he had been unable to properly express himself.

HAS THE APPLICANT GIVEN, OR CAUSED TO BE GIVEN A BOGUS DOCUMENT, OR INFORMATION THAT IS FALSE OR MISLEADING IN MATERIAL PARTICULAR?

39. The term 'information that is false or misleading in a material particular' is defined in cl.4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in cl.4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Batra v MIAC* [2013] FCA 274.
40. The requirement in cl.4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: cl.4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
41. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
42. As set out above, the applicant provided the Department with an employment reference from his father, Jashwant A. Thakkar. It is apparent that this was in both Gujarati and English. The English version contains a stamp dated 10 September 2013. The applicant has subsequently provided a translation of the Gujarati version from an accredited interpreter. While the wording of this translation differs in some respects from the wording of the initial English version, the substance of the two translations is essentially the same. The differences would appear to be related to the skill levels of the respective translators.
43. It was some eight months later, in May 2014, that the Department conducted checks in relation to the employment reference letter. The Tribunal notes that the applicant has disputed the accuracy of the information recorded by the Department in relation to the checks conducted in May 2014. The applicant has provided documentation relating to his claimed role in the business, including material such as tax records, references and invoices with his signature. Nevertheless, the Tribunal does not consider that there is any satisfactory explanation as to why the information recorded by the Department would be at odds with the real content of the conversation to the extent claimed by the applicant. The checks conducted by the Department suggest that Saibaba Agency does exist, that the applicant's father is the proprietor of the agency and that the applicant has worked for the business as has been claimed. Nevertheless, the discrepancy between the information in the reference and the results of the Department's checks strongly suggests that the employment reference greatly exaggerated the applicant's role in the business. Notwithstanding that the applicant worked in the business, the evidence indicates that the reference is not an entirely accurate reflection of the applicant's role in the business.

44. This, however, is not the end of the matter. The Tribunal must consider whether there is no evidence that the applicant has given, or caused to be given a bogus document, or information that is false or misleading in a material particular.
45. Pursuant to s.5 of the Act, a bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:
- (a) purports to have been, but was not, issued in respect of the person; or
 - (b) is counterfeit or has been altered by a person who does not have authority to do so; or
 - (c) was obtained because of a false or misleading statement, whether or not made knowingly.
46. The Tribunal has considered whether any of the alternatives in the definition of bogus document is made out in this case.
47. With regard to paragraph (b), the Tribunal notes that there are two versions of the employment reference document, one in English and one in Gujarati. Notwithstanding the information in the record of the conversation of 1 May 2014, Jashwant Thakkar has confirmed that he did in fact sign the reference. The Tribunal has been able to compare the signature on the reference documents with Mr Thakkar's signature on official documents, including a document issued by the Commissioner of Income Tax. The Tribunal accepts that the applicant's father, Mr Jashwant Thakkar, did in fact sign both the English and Gujarati versions of the work reference. It accepts that the documents have not been altered by a person who does not have authority to do so and are not counterfeit. The Tribunal finds that the document is not a bogus document within the meaning of paragraph (b) of the definition of "bogus document".
48. It is recorded that, when contacted by the Department, the applicant's father, Mr Thakkar, was initially unable to recall providing a reference letter and then said that he might have signed a letter. This might raise some concern about the manner in which the document was issued. However, as discussed above, it is apparent that the applicant's father did in fact sign both an English and a Gujarati version of the employment reference. In his evidence to the Tribunal, he confirmed that he was aware of the reference and had attached his signature. The Tribunal notes that the Australian High Commission's contact with Mr Thakkar occurred some eight months after he had produced the reference. With regard to what occurred during the conversation, the Tribunal has before it only written notes in English which contain only very brief reference to the issue of the employment reference letter. Particularly given that the applicant's father's signature does in fact appear on the documents, the Tribunal treats this information with some caution. In all the circumstances, it accepts that the employment reference was in fact issued in respect of the applicant, notwithstanding that the information in the document might exaggerate the applicant's role in the business. In these circumstances, the Tribunal finds that the document is not a bogus document in terms of paragraph (a) of the relevant definition.
49. The delegate's decision highlights paragraph (c) of the definition of "bogus document". This is apparently on the basis that, while the applicant's father may have signed the document, he could not speak English and could not recall having produced the document. However, as noted above, the applicant's father was contacted some considerable period after producing the document. The record of the conversation contains only brief notes about this issue. The applicant's father has subsequently consistently claimed that he was aware of the employment reference and was behind its production. While the applicant's evidence at the hearing as to who produced the translation was not entirely consistent with Mr Thakkar's evidence, the Tribunal notes that it is not suggested that the applicant had direct knowledge

of how the translation was obtained. The notes of the telephone conversation of 1 May 2014 suggest that Mr Thakkar was initially unable to recall providing the reference and that he referred to his lack of knowledge of English. However, the reference was initially provided in both English and Gujarati. Both versions were signed by Mr Thakkar. This suggests that Mr Thakkar would have been aware of the content of the reference and is consistent with evidence that has subsequently been provided in this regard. It is not consistent with the suggestion that he might have signed a letter without being aware of its contents. This suggests that he would not have been reliant on false or misleading information provided to him by the applicant or someone else. Mr Thakkar is the applicant's father. The Tribunal considers that he would have been aware of the content of the documents he signed and would not have been reliant on false or misleading information provided by any party. Having regard to all the evidence, the Tribunal finds that the evidence does not provide a basis to reasonably suspect that the document was obtained because of a false or misleading statement, whether or not made knowingly. The Tribunal finds that the document is not a bogus document in terms of paragraph (c) of the relevant definition.

50. The Tribunal appreciates the delegate's concerns about the content of the employment reference. Nevertheless, on the evidence before it, the Tribunal concludes that the employment reference does not constitute a "bogus document" in terms of the definition in s.5 of the Act. It is satisfied that there is no evidence that the applicant has given, or caused to be given, a bogus document.
51. The Tribunal has considered whether, by providing the employment reference and associated documentation such as the Curriculum Vitae, the applicant has given, or caused to be given, information that is false or misleading in material particular. At hearing, the Tribunal discussed in particular the requirements of cl.187.234. It is this criterion that refers to an applicant's skills or qualifications. It would appear that neither paragraph (a) nor paragraph (b) of cl.187.234 applies as the applicant was not in a class of persons specified in the relevant instrument and the applicant's occupation was not specified in the relevant instrument. In these circumstances, he would be required to satisfy paragraph (c) which provides that the applicant must have the qualifications listed in ANZSCO as being necessary to perform the tasks of the occupation. With regard to the occupation of Café or Restaurant Manager, ANZSCO identifies the relevant formal qualifications as "AQF Associate Degree, Advanced Diploma or Diploma (ANZSCO Skill Level 2)", although it also indicates that a certain period of relevant experience might substitute for the formal qualifications and that, in some instances, relevant experience and/or on-the-job training might be required. The Tribunal accepts that the applicant clearly has "the qualifications" listed in ANZSCO as being necessary to perform the tasks of the occupation. He has provided evidence of a range of qualifications from Australian institutions, including a Diploma of Management, a Diploma of Business, an Advanced Diploma of Management, a Certificate IV in Business Administration and a Certificate III in Food Processing (Retail Baking) – Cake and Pastry. In the circumstances, the Tribunal accepts that there is no visa criterion on which the apparently false or misleading information could materially bear. It is satisfied that there is no evidence that the applicant has given, or caused to be given, information that is false or misleading in a material particular.
52. The Tribunal is satisfied that there is no evidence that the applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular.
53. Therefore, the applicant meets cl.4020(1).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(1)?

54. Clause 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy cl.4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2AA).
55. There is nothing in the evidence to suggest that the applicant or any member of his family unit has ever been refused a visa because of a failure to satisfy cl.4020(1). Therefore, the applicant meets the requirements of cl.4020(2).

SHOULD THE REQUIREMENTS OF CL.4020(1) OR (2) BE WAIVED?

56. The requirements of cl.4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa.
57. As the Tribunal has found that the requirements of cl.4020(1) and cl.4020(2) are met, it is not necessary to consider waiver.

HAS THE APPLICANT SATISFIED THE IDENTITY REQUIREMENTS?

58. Clause 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. The applicant has produced identity documents, including a copy of his birth certificate. He has satisfied the Tribunal as to his identity.
59. Therefore, the applicant meets cl.4020(2A).

HAS A VISA PREVIOUSLY BEEN REFUSED ON THE BASIS OF A FAILURE TO SATISFY CL.4020(2A)?

60. Clause 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: cl.4020(2BA).
61. There is nothing in the evidence to suggest that the applicant or any member of his family unit has ever been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A). Therefore, the applicant meets the requirements of cl.4020(2B).
62. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.187.213(3) and cl.187.213(1).
63. It is not necessary for the Tribunal to consider all of the criteria for the visa. The Department will need to consider whether the applicant meets other criteria for the visa.

64. Secondary Applicant

65. With regard to the second named applicant, the delegate stated that PIC 4020 is a "one fails, all fails" provision. The delegate stated that PIC 4020 is both a Schedule 2 primary criterion

and Schedule 2 secondary criterion. The delegate concluded that, due to the “one fails, all fails” provision, the second named applicant did not meet PIC 4020. The delegate found that the applicant did not meet cl.187.313(1).

66. However, the Tribunal is satisfied on the evidence before it that the second named applicant does in fact satisfy PIC 4020.
67. There is no evidence before that the second named applicant has given, or caused to be given, a bogus document or information that is false or misleading in a material particular. Therefore, the second named applicant meets cl.4020(1).
68. There is nothing in the evidence to suggest that the second named applicant or any member of her family unit has ever been refused a visa because of a failure to satisfy cl.4020(1). Therefore, the second named applicant meets the requirements of cl.4020(2).
69. The second named applicant has satisfied the Tribunal as to her identity and meets cl.4020(2A).
70. There is nothing in the evidence to suggest that the second named applicant or any member of her family unit has ever been refused a visa because of a failure to satisfy the identity requirements in cl.4020(2A). Therefore, the second named applicant meets the requirements of cl.4020(2B).
71. On the basis of the above, the second named applicant does satisfy PIC 4020 for the purposes of cl.187.313(1).

DECISION

72. The Tribunal remits the applications for Regional Employer Nomination (Permanent) visas for reconsideration, with the following directions:
 - the first named applicant meets Public Interest Criterion 4020 for the purposes of cl.187.213(1) of Schedule 2 to the Regulations;
 - the first named applicant meets Public Interest Criterion 4020 in respect of the second named applicant for the purposes of cl.187.213(3) of Schedule 2 to the Regulations; and
 - the second named applicant meets Public Interest Criterion 4020 for the purposes of cl.187.313(1) of Schedule 2 to the Regulations.

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Don Smyth
Senior Member

ATTACHMENT

MIGRATION REGULATIONS 1994

SCHEDULE 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; the applicant and each member of a family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa; neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

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MIGRATION ACT 1958

S.5 INTERPRETATION

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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